

## SUBJECT DETAILS

Data on the subject	
Name	Commercial Arbitration and Alternative Dispute Resolution
Degree	Postgraduate in Master in International and European Business Law
Year	2020-2021
Nature	Fall
ECTS Credits	2 ECTS
Department	Law
Area	Law
Teaching staff	José Ángel Rueda García, Maribel Rodríguez Vargas

Data on the teaching staff	
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Tutoring Schedule	Upon request from students

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Tutoring Schedule	Upon request from students

**Professors Maribel Rodriguez and Jose Angel Rueda:**

## **SUBJECT DETAILS**

### **SPECIFIC DATA ON THE SUBJECT**

Pre-requisites
None
Contribution of the degree to the professional profile
<p>Education in the adjudication of international law disputes involving sovereign States and in close connection with human rights litigation through alternative dispute resolution mechanisms.</p> <p>Familiarisation with general international law (particularly, responsibility of States for internationally wrongful acts), treaty law and international investment law from both theoretical and practical viewpoints.</p> <p>The student will benefit from applying their knowledge of arbitration acquired in the course on Commercial Arbitration and Alternative Dispute Resolution to a specific area of public international law.</p>

### **COMPETENCES TO BE IMPROVED**

Generic competences
Instrumental
GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills

GC 5: Decision-making skills  
 GC 6: Team work skills  
 GC 12: Ability to apply theoretical knowledge into practice

**Specific competences of the subject**

**Conceptual (knowing)**

SC 9 - Ability to assess pre-contentious (or preventive) strategies in the context of international business at the moment of contract formation and negotiation with business partners.

SC 10 - Ability to assess strategies before arbitral tribunals in matters related to international trade.

**THEMATIC AREA AND CONTENT**

**AREA 1: INTRODUCTION**

**Theme 1: INTRODUCTION TO INTERNATIONAL INVESTMENT LAW AND ARBITRATION**

- 1.1. Concept and evolution of international investment law and arbitration
- 1.2. Presentation of the structure of the course
- 1.3. Brief analysis of *Philip Morris v. Uruguay* (2016): debate about the clash/interrelation of public and private interests in international investment law

**AREA 2: DEVELOPMENT OF AN INVESTMENT PROTECTION CASE**

**Theme 1: ACCESS TO INVESTMENT ARBITRATION: JURISDICTION**

- 1.1. Investment arbitration under treaties and investment laws; *Maffezini v. Spain* (2000)
- 1.2. Contractual investment arbitration
- 1.3. Arbitral fora available for investors: ICSID, PCA, SCC, ICC, UNCITRAL...
- 1.4. Objections to jurisdiction. Analysis of *RREEF v. Spain* (2016)
- 1.5. Abuse of process in investment arbitration: *Philip Morris v. Australia* (2015)

**Theme 2: SUBSTANTIVE STANDARDS OF PROTECTION OF INTERNATIONAL INVESTMENT LAW (1)**

- 2.1 Fair and equitable treatment
- 2.2. Detailed analysis of case law from *TecMed v. Mexico* (2003) to *El Paso v. Argentina* (2011); recent developments in *Philip Morris v. Uruguay* (2016), *Eiser v. Spain* (2017), *Masdar v. Spain* (2018), *InfraRed v. Spain* (2019)

**Theme 3: SUBSTANTIVE STANDARDS OF PROTECTION OF INTERNATIONAL INVESTMENT LAW (2)**

- 3.1. Expropriation; definition in investment treaties and types
- 3.2. Analysis of case law: *Metalclad v. Mexico* (2000), *Yukos v. Russia* (2014), *Philip Morris v. Uruguay* (2016)

#### Theme 4: SUBSTANTIVE STANDARDS OF PROTECTION OF INTERNATIONAL INVESTMENT LAW (3)

- 4.1. Umbrella clause
- 4.2. Most-favoured nation clause
- 4.3. Analysis of case law: *White Industries v. India* (2011), *SGS v. Paraguay* (2012)

#### Theme 5: CURRENT TRENDS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION; SPECIAL FOCUS ON INVESTMENT PROTECTION AND ARBITRATION UNDER EU LAW

- 5.1. US practice: from NAFTA Chapter XI to USMCA
- 5.2. EU practice: CETA model (Canada), IPA model (Singapore); CJEU's case law in *Achmea* and on CETA; termination of intra-EU bilateral investment treaties
- 5.3. Arbitral practice: *Vattenfall v. Germany* (2018), *Eskosol v. Italy* (2019)
- 5.3. From international arbitration to a multilateral investment court?
- 5.4. Transparency in international investment arbitration: the Mauritius Convention

### AREA 3: Awards and Post-Award Remedies

#### Theme 1: ICSID ARBITRATION: GENERAL FEATURES; AWARDS IN INVESTMENT ARBITRATION AND POST-AWARD REMEDIES

- 1.1. Jurisdictional objections and defences
- 1.2. Procedural issues: proceeding, written and oral phases, fact and expert witnesses
- 1.3. Costs and funding
- 1.4. Revision and interpretation of investment awards
- 1.5. Challenge of investment awards; annulment
- 1.6. Enforcement and execution of awards; state immunity defenses

## BIBLIOGRAPHY AND RESOURCES

### Basic Bibliography

#### Textbooks

For a proper analysis of the course we recommend the following two books:

- Dolzer, Rudolf / Schreuer, Christoph, *Principles of International Investment Law*, 2<sup>nd</sup>. Edition, 2012 (a third edition may be available soon)

- Hobér, Kaj, *Investment Treaty Arbitration. Problems and Exercises*, 2018

Students may also rely on, among others (non-exhaustive list):

- McLachlan, Campbell / Shore, Laurence / Weiniger, Matthew, *International Investment Arbitration: Substantive Principles*, 2008
- Newcombe, Andrew / Paradell, Lluís, *Law and Practice of Investment Treaties*, 2009
- Salacuse, Jeswald W., *The Law of Investment Treaties*, 2010
- Schreuer, Christoph, *The ICSID Convention: A Commentary*, 2009

Students shall also read the excerpts of relevant case law that the professors shall share with the students via Moodle

#### Chapters of books (non-exhaustive)

- Claros Alegría, Pedro / Rueda García, José Ángel: “Spain”, in J. Fouret (Ed.), *Enforcement of Investment Treaty Awards*, London, 2015, pp. 403-416

#### Articles (non-exhaustive)

- Commission, Jeffrey P., “Precedent in Investment Treaty Arbitration-A Citation Analysis of a Developing Jurisprudence,” 24(2) *Journal of International Arbitration* 129-158 (2007)
- Tai-Heng Cheng, “Precedent and Control in Investment Treaty Arbitration,” 30 *Fordham Int'l Law Journal* 1014-1049 (2007)

#### Websites (free access unless otherwise stated)

International Centre for Settlement of Investment Disputes (ICSID, publicly available case law): <https://icsid.worldbank.org>

Permanent Court of Arbitration (PCA, publicly available case law): [www.pca-cpa.org](http://www.pca-cpa.org)

United Nations Commission for International Trade Law (UNCITRAL): [www.uncitral.org](http://www.uncitral.org)

International Court of Justice (ICJ): [www.icj-cij.org](http://www.icj-cij.org)

Investment Treaty Arbitration (publicly available case law): [www.italaw.com](http://www.italaw.com)

Transnational Dispute Management (*payment access*): [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

European Commission’s website on Investment: <https://ec.europa.eu/trade/policy/accessing-markets/investment/>

#### Notes

To be indicated during the course

#### Other materials

To be indicated during the course, particularly case law

## TEACHING METHODOLOGY

General methodological aspects of the subject
Contact hours methodology: Activities
1 hour pre and/or after each class-session
Independent study methodology: Activities
Reading materials and self-preparation of answers to questions

SUMMARY OF STUDENT WORK HOURS			
Activity	Number of class hours	Number of independent study hours	Total number of hours
Lecture	13	15	28
Practical class	5	15	20
Debate			
In class presentation			
Individual work			
Work in collaboration			
Evaluation: one minute paper			
Evaluation: class test			
Evaluation: exam	2		2
Evaluation: exam review			
Others			
<b>ECTS Credits:</b>	<b>20</b>	<b>30</b>	<b>50</b>

**GRADE EVALUATION AND CRITERIA – PROF. RUEDA GARCÍA and RODRÍGUEZ VARGAS**

Evaluation Activities	Generic Competences	Indicators
Debate	GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills GC 5: Decision-making skills GC 12: Ability to apply theoretical knowledge into practice	Coherent oral expression, correct use of the sources of information to construe an argument, correct answer to questions posed by professors or fellow students
Class presentation	GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills GC 5: Decision-making skills GC 6: Team work skills GC 12: Ability to apply theoretical knowledge into practice  SC 10 - Being able to design strategies and adversarial proceedings before national courts, community courts and / or alternative dispute resolution bodies in matters related to international trade (as well as their coordination)	Coherent oral expression, correct use of the sources of information to construe a presentation, correct answer to questions posed by professors or fellow students
Evaluation: exam (final)	GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills GC 5: Decision-making skills GC 12: Ability to apply theoretical knowledge into practice  SC 9 - Being able to design pre-contentious (or preventive) strategies that are appropriate for the protection of proper international business development at EU level	Correct answers to the questions formulated by the professor in the written exam.

	SC 10 - Being able to design strategies and adversarial proceedings before national courts, community courts and / or alternative dispute resolution bodies in matters related to international trade (as well as their coordination)	
Attendance	Demonstration of interest in the courses	Regular attendance to classes – control by signature of

**Prof. Borja´s Class:**

**SPECIFIC DATA ON THE SUBJECT**

<b>Pre-requisites</b>
None
<b>Contribution of the degree to the professional profile</b>
<p>Dispute resolution is instrumental to the functioning of international business and must be managed accordingly by businesses. In choosing a particular method of dispute resolution, the main variables are cost, time, effectiveness and commercial considerations. International commercial arbitration is one of the available alternatives. A range of variables should be examined when including arbitration in a business' dispute resolution strategy. The course explores the main aspects of commercial arbitration that are relevant to the choice of arbitration as a method of dispute resolution.</p>

**COMPETENCES TO BE IMPROVED**

<b>Generic competences</b>
<b>Instrumental</b>
<p>GC 2: Ability to communicate orally and in writing  GC 4: Problem-solving skills  GC 5: Decision-making skills  GC 6: Team work skills  GC 12: Ability to apply theoretical knowledge into practice</p>
<b>Specific competences of the subject</b>
<b>Conceptual (knowing)</b>



SC 9 - Ability to assess pre-contentious (or preventive) strategies in the context of international business at the moment of contract formation and negotiation with business partners.

SC 10 - Ability to assess strategies before arbitral tribunals in matters related to international trade.

## THEMATIC AREA AND CONTENT

### AREA 1: ARBITRATION FRAMEWORK

#### Theme 1: INTRODUCTION

- 1.1 ADR and different dispute resolution mechanisms
- 1.2 Concept of arbitration
- 1.3 Pros and cons of arbitration
- 1.4 *Ad-hoc* and institutional arbitration
- 1.5 International commercial arbitration vs investment arbitration (ICSID/BIT)

#### Theme 2: LAW APPLICABLE TO ARBITRATION

- 2.1 Laws and Rules applicable to arbitration: *lex arbitri*, institutional arbitration rules and substantive law
- 2.2 UNCITRAL Model Law and brief reference to other jurisdictions (US, UK, Spain and other countries)

#### Theme 3: INTERNATIONAL ARBITRATION RULES AND TRIBUNAL'S PROCEDURAL POWERS

- 3.1 UNCITRAL Arbitration Rules
- 3.2 Institutional arbitration rules
  - ICC
  - Reference to AAA, LCIA or CAM (Madrid)
- 3.3 Arbitration soft law (e.g. IBA Rules, IBA Guidelines)
- 3.4 Tribunal's procedural orders

### AREA 2: COMMERCIAL ARBITRATION PRACTICE

#### Theme 1: ARBITRATION CLAUSE, FORUM AND ARBITRABILITY

- 1.1 Arbitration agreement: effects (positive/negative), severability and kompetenz-kompetenz principle
- 1.2 The legal significance of the seat of arbitration
- 1.4 Multi-party arbitration
- 1.5 Arbitrability

#### Theme 2: ARBITRATORS

- 2.1 Number of Arbitrators: sole arbitrator or tribunal
- 2.2 Impartiality and independence of arbitrators

2.3 Party-appointed arbitrators and president/chairman

2.4 Challenge of arbitrators

### Theme 3: KEY PROCEDURAL ISSUES

3.1 Constitution of Arbitral Tribunal

3.2 Submissions of the parties

3.3 Taking of evidence

3.4 Award

### Theme 4: ANNULMENT & ENFORCEMENT OF ARBITRATION AWARDS

4.1 Annulment of awards

4.1 Domestic enforcement

4.2 International enforcement: NY Convention (1958)

## BIBLIOGRAPHY AND RESOURCES

### Basic Bibliography

#### Text books

#### Mandatory Readings (provided by Prof. via Moodle)

- ***Redfern and Hunter on International Arbitration*** (6th edition), Blackaby, Partasides, et al., 2015, Oxford University Press (*available at KluwerArbitration.com*).

Main chapters of this seminal hornbook:

- a) Chapter 2 – Agreement to Arbitrate
  - b) Chapter 3 – Applicable Laws
  - c) Chapter 3 – Establishment and Organization of Arbitral Tribunal
  - d) Chapter 5 – Powers, Duties and Jurisdiction of Arbitral Tribunals
  - e) Chapter 10 – Challenge of Arbitral Awards
  - f) Chapter 11 – Recognition and Enforcement of Arbitral Awards
- ***Reference Texts***
    - a) UNCITRAL Model Law (1985, with amendments as adopted in 2006)
    - b) 1996 Arbitration Act (England, Wales and Northern Ireland)
    - c) US Federal Arbitration Act (9 U.S.C. Chapter 1) and Understanding the US Federal Arbitration Act (Thomson Reuters Practical Law)
    - d) IBA Guidelines on Party Representation in International Arbitration (2013)
    - e) IBA Guidelines on Conflict of Interest in International Arbitration (2014)
    - f) IBA Rules on the Taking of Evidence in International Arbitration (2010)

- g) ICC Arbitration Rules (2017)
- h) ICC Model Terms of Reference
- i) UNCITRAL Arbitration Rules (2010, with 2013 amendments)
- j) Sample Flowchart on phases of complex arbitration proceedings
- k) ICC Model Procedural Timetable
- l) NY Convention (1958)
- m) Status of Ratification of NY Convention

- **Caselaw decisions**

- a) *Sulamerica* [2012] EWCA Civ 638 (16 May 2012)
- b) *BlueBank v. Venezuela*, ICSID Case No. ARB/12/20, Decision on disqualification (12 Nov 2013)
- c) *COMMISA v. PEMEX*, 2<sup>nd</sup> Cir. (2 Aug 2016)
- d) *In re chairman Haigh* [2016] EWHC 422 (Comm.) (2 Mar 2016)
- e) *Commerzbank* [2017] EWHC 161 Comm (03 Feb 2017)
- f) *Henry Schein*, US Supreme Court (8 Jan 2019)
- g) *GE Energy Power Conversion France*, US Supreme Court (1 Jun 2020)

Additional Readings (available at *KluwerArbitration.com* <Books>):

- ***International Arbitration: Law and Practice (2<sup>nd</sup> edition)***, Gary B. Born, 2015, Kluwer Law International
- ***Comparative International Commercial Arbitration***, Lew, Mistelis, Kröll, Blackaby, 2003, Kluwer International Law

Chapters of books

Articles

Websites

- [www.kluwerarbitration.com](http://www.kluwerarbitration.com)
- [www.iccwbo.org/court](http://www.iccwbo.org/court)
- [www.lcia.org](http://www.lcia.org)
- <https://www.adr.org/>
- [www.arbitramadrid.com/web/corte/home/](http://www.arbitramadrid.com/web/corte/home/)
- <http://www.newyorkconvention.org>
- <https://uncitral.un.org/en/texts/arbitration>

Notes
Other materials

### TEACHING METHODOLOGY

General methodological aspects of the subject
Contact hours methodology: Activities
Lectures (7 hours) Cases (3 hours: 1 hour (in-class practice exercise) and 2 hours for individual final exam)
Independent study methodology: Activities
Reading materials

### SUMMARY OF STUDENT WORK HOURS

Activity	Number of class hours	Number of independent study hours	Total number of hours
Lecture	7	10	17
Practical class	1	3	4
Debate			
In class presentation			
Individual work			
Work in collaboration			
Evaluation: one minute paper			
Evaluation: class test			
Evaluation: exam	2	7	9
Evaluation: exam review			
Others			
<b>ECTS Credits:</b>	<b>10</b>	<b>20</b>	<b>30</b>

## GRADE EVALUATION AND CRITERIA – PROF. ÁLVAREZ

Evaluation Activities	Generic Competences	Indicators	Evaluation Weighting
Participation	GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills GC 5: Decision-making skills GC 12: Ability to apply theoretical knowledge into practice	Participation will be assessed on the basis of the attentiveness shown in class by the students and their active role in addressing oral questions about the materials and topics discussed in class.	10%
Evaluation: in-class practice exercises	GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills GC 5: Decision-making skills GC 6: Team work skills GC 12: Ability to apply theoretical knowledge into practice	Students will review, resolve and discuss practice exercises. Their ability to apply the main principles of arbitration will be tested in order to assess their understanding of the key issues discussed in class and their legal reasoning. <ol style="list-style-type: none"> <li>1. Potential benefits of <i>ad hoc</i> arbitration vs institutional arbitration.</li> <li>2. Tribunal's jurisdiction.</li> <li>3. Challenge of arbitrators.</li> <li>4. Enforcement of arbitral award.</li> </ol>	40% continuous evaluation (2 practice exercises)
Evaluation: exam (final)	GC 2: Ability to communicate orally and in writing GC 4: Problem-solving skills GC 5: Decision-making skills SC 10 - Ability to structure a claim or defense before an arbitral tribunal	Correct answers to the questions and brief case studies formulated by the professor on written exam covering the main issues addressed in the readings & cases and the reference texts & materials.  Understanding of main concepts and legal reasoning will be assessed.	50% final exam

